Supreme Court, U.S.
FILED
MAR 8 2002
CLERK

(2)

No. 01-960

IN THE

Supreme Court of the United States

CAVALIER MANUFACTURING, INC.
D/B/A BUCCANEER HOMES OF ALABAMA, INC.,

Petitioner,

v.

ANGELA JACKSON AND SHAWYN JACKSON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice , P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

G. William Gill
James G. Bodin
McPhillips, Shinbaum & Gill, L.L.P.
516 South Perry Street
Montgomery, Alabama 36109
(334) 262-1911

Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
One Kaiser Plaza, Suite 275
Oakland, CA 94612-3684
(510) 622-8150

2088

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MASTROBUONO* 6

A. *Mastrobuono Is* Readily Distinguishable From This Case. 6

B. This Court Has Consistently Held That The FAA Does Not Alter Or Override Generally Applicable State Laws. 7

C. This Court Has Consistently Stated That Arbitration Agreements May Involve A Change In Forum But Not A Waiver Of Or Failure to Effectively Vindicate Substantive Laws. 9

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THE OTHER CASES CITED BY CAVALIER. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) 11, 14

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988) 11

Cole v. Burns Int'l Security Serv's, 105 F.3d 1465 (D.C. Cir. 1997) 10

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995) 11, 12

DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) 10

LaChance v. Northeast Publishing, Inc., 965 F. Supp. 177 (D. Mass. 1997) 10

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 1, 7

EEOC v. Waffle House Corp., 122 S. Ct. 754 (2002) 2, 5

Ex Parte Thicklin, 2002 WL 27925 (Ala. 2002) 2, 5, 8

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 11

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 8, 9

Glass v. Kidder Peabody & Co., Inc.,
114 F.3d 446 (4th Cir. 1997) 12

Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244
(9th Cir. 1994) 10

Hooters of America, Inc. v. Phillips, 173 F.3d 933
(4th Cir. 1999) 14

Martens v. Smith Barney, Inc., 181 F.R.D. 243
(S.D.N.Y. 1998) 10

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) ..... *passim*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 8, 9

Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054
(11th Cir. 1998) 10, 14

Parrett v. City of Connersville, Ind., 737 F.2d 690
(7th Cir. 1984) 10

Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753
(7th Cir. 2001) 14

Perez v. Globe Airport Security Services, 253 F.3d 1280
(11th Cir. 2001) 10

Pitchford v. Oakwood Mobile Homes, Inc.,
124 F.Supp.2d 958 (W.D. Va. 2000) 3

Powertel v. Bexley, 743 So.2d 570
(Fla. Dist. Ct. App. 1999) 14

Primeco Personal Communications v. Commonwealth Distributors, Inc., 740 So.2d 585 (Fl. Dist. Ct. App. 1999) 12, 14

Raesly v. Grand Housing, Inc., 105 F.Supp.2d 562 (S.D. Miss 2000) 3

Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) 11, 14

Reece v. Finch, 562 So.2d 195 (Ala. 1990) 8

Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) 14

Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984) 11

Wilson v. Waverlee Homes, Inc., 954 F.Supp. 1530 (M.D. Ala. 1997), aff'd, 127 F.3d 40 (11th Cir. 1997) .. 3

Statutes:

Alabama Code § 6-11-20 7

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* 6, 7

INTRODUCTION

The opinion of the Alabama Supreme Court in this case and the question presented in the Petition for Certiorari do not warrant a grant of this Court's discretionary review. This Court has consistently instructed that arbitration clauses need not be enforced if they violate generally applicable principles of state contract law, and do not allow claimants to vindicate their statutory rights. That is what happened in this case.

The Court below held that a contractual provision prohibiting a party from making a claim under Alabama statutes for punitive damages violated the public policy of Alabama. Petitioner Cavalier Manufacturing, Inc. ("Cavalier") asserts that the decision below conflicts with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Cavalier points to language in *Mastrobuono* stating that courts should "enforce the arbitration clause as written" and argues that, by striking the contract's ban on punitive damages, the court below failed to enforce the clause as written.

Cavalier's argument overstates and misconstrues *Mastrobuono*. This Court did not hold, and has never held, that any provision included in a contract section under the heading of "arbitration" must be enforced without limitation. In fact, the Alabama Supreme Court's opinion is entirely consistent with two recurring themes from this Court's opinions that qualify the notion that arbitration clauses must be enforced as written.

First, this Court has held that the FAA permits states to apply generally applicable contract defenses to arbitration clauses. *See, e.g., Doctor's Association, Inc. v. Casarotto*, 517 U.S. 681 (1996). In this case, the state court applied such a body of state law to invalidate a limitation on liability, while still enforcing the arbitration clause and compelling arbitration of all claims. Apparently hoping to suggest that the state court was not applying "generally applicable law," Cavalier portrays that decision as an

attack by the state court on the Federal Arbitration Act ("FAA"). This is hardly the case. The Alabama Supreme Court *granted* Cavalier's motion to compel arbitration, and all claims in this case will be arbitrated. This Petition does not raise the question of whether an arbitrator or a court will hear this case, but instead raises the question of whether the FAA overrides Alabama's generally applicable contract law relating to exculpatory clauses. The court below held that Alabama law forbids parties from entering into any contract that denies parties the substantive right to recover punitive damages under Alabama statutes. As the Alabama Supreme Court has made clear, this prohibition on waivers of statutory punitive damages claims is a rule of law that Alabama courts apply without respect to the forum in which a case is heard. *See Ex Parte Thicklin*, 2002 WL 27925 (Ala. 2002).

This Court has also consistently recognized a second limitation on the notion that arbitration clauses are to be enforced as written. This Court has consistently stated that arbitration clauses are to be enforced only where they permit claimants to effectively vindicate their statutory rights. *See EEOC v. Waffle House Corp.*, 122 S. Ct. 754, 755 n. 10 (2002). Because the ban on punitive damages in Cavalier's contract would not permit its customers (such as the Jacksons, the Respondents here) to vindicate their substantive statutory rights under Alabama law, it is entirely consistent with this Court's opinions for Alabama law to bar such a waiver.

Finally, Cavalier claims that the opinion below conflicts with a number of decisions by other courts. In fact, none of the cases cited by Cavalier conflict with the opinion below, as none involves a challenge to an arbitration clause that prohibits the award of punitive damages, and none involves a generally applicable body of state substantive law such as limitations on exculpatory clauses that strip consumers of statutory remedies. Instead, nearly all of the cases cited by Cavalier involve the readily distinguishable setting where courts affirmed decisions by arbitrators who had awarded punitive damages to a party.

For these reasons, the Court should not grant review on the question presented in the Petition for Certiorari.

STATEMENT OF THE CASE

The mobile home that Petitioners Angela Jackson and Shawyn Jackson purchased from Respondent Cavalier is seriously defective. After failing to obtain redress for the various defects to the home, the Jacksons sued Cavalier, alleging negligence, breach of contact, breach of express and implied warranties, and fraud. After Cavalier moved to compel arbitration, the Jacksons argued (among other things) (a) that their claims for breach of express warranty under the Magnuson-Moss Warranty Act could not be forced into arbitration; (b) that arbitration under Petitioner's clause would be prohibitively expensive; and (c) that the clause's ban on punitive damages did not permit them to effectively vindicate their substantive statutory rights. The trial court denied Cavalier's Motion to Compel Arbitration without making any finding of fact.

In its first opinion in this case, decided on April 13 2001, the Alabama Supreme Court rejected most of the Jacksons' arguments against the arbitration clause. It held that "the Magnuson-Moss Act does not invalidate arbitration provisions in a warranty disregarding substantial federal precedent to the contrary."[1] The Court also rejected the Jacksons' arguments about the cost of arbitration, finding that the Jacksons had not shown "financial hardship," even though "the record shows that Angela Jackson was disabled and unemployed when the trial court denied Cavalier's Motion to Compel Arbitration. . . ." App. B at 6. On the final issue, however, the Court remanded "this case with instructions for the trial court to determine whether the arbitration clause is valid even though it prohibits the arbitrator from awarding punitive damages." App. B at 8.

---

[1] *See, e.g., Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530 (M.D. Ala. 1997), aff'd, 127 F.3d 40 (11th Cir. 1997); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958 (W.D. Va. 2000); *Raesly v. Grand Housing, Inc.*, 105 F.Supp.2d 562 (S.D. Miss 2000).

On remand, the trial court held:

> The Court finds that the subject arbitration clause is not valid or enforceable because it prohibits the arbitrator from awarding punitive damages. In this case, the Plaintiffs have alleged, among other things, the tort of Fraud. This Court holds that the prohibition against the award of punitive damages by an arbitrator denies [the plaintiffs] a[n] adequate remedy.

In its second opinion in this case, dated October 5, 2001, the Alabama Supreme Court held "that an arbitration clause that forbids an arbitrator from awarding punitive damages is contrary to public policy in Alabama and, thus is void." (Appendix A, p. 3). The court noted that Cavalier had claimed that this Court's opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) provides that a contract may bar arbitrators from providing punitive damages. The Alabama Supreme Court explained, however, that the quoted language *Mastrobuono* did not dictate the outcome in this case. The court below pointed out that the dicta cited by Cavalier from *Mastrobuono* was in the setting of an agreement "governed by the laws of the State of New York." Appendix A at 4, citing *Mastrobuono*, 514 U.S. at 53. The significance of this, as the Alabama Supreme Court went on to explain, was that New York state law generally prohibits arbitrators from awarding punitive damages. In such a state, where the state's laws place such a sharp limitation on the power of arbitrators, there is no possible issue of conflict between an arbitration contract containing a prohibition on punitive damages and state public policy. New York's limitation on the power of arbitrators -- which reflects a suspicion of and hostility towards the arbitration process -- is not found in Alabama law. Since Alabama law permits arbitrators to enforce the statutory rights of Alabama parties, the Court held that the cited language in *Mastrobuono* did not apply and that Alabama law could and does prohibit arbitration contracts that prevent arbitrators from vindicating the rights found in Alabama statutes.

The Alabama Supreme Court also set out the principal reason underlying the rule of public policy prohibiting parties from entering into contracts that bar statutory punitive damages, and that reason is plainly applicable to all contracts, whether they involve arbitration or not:

> We hold that a predispute arbitration clause that forbids an arbitration from awarding punitive damages is void as contrary to the public policy of this State – to protect its citizens in certain legislatively prescribed actions from wrongful behavior and to punish the wrongdoer. If parties to an arbitration agreement waive any arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions.

Appendix A at 7. This language is strikingly similar to statements that this Court made relating to the role of punitive damages in this Court's recent decision in *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 765 (2002). In another case decided shortly afterwards, the Alabama Supreme Court explained that the state's public policy against waivers of statutory punitive damages claims applies whether a contract involves arbitration or not. *See Ex Parte Thicklin*, 2002 WL 27925 (Ala. 2002).

Nonetheless, after holding that the contract's prohibition on punitive damages was unenforceable, the Alabama Supreme Court went on to "hold that the arbitration clause is valid and enforceable and that the trial court, therefore, erred when it denied Cavalier's motion to compel arbitration." Appendix A at 8.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the holding of the Alabama Supreme Court in this case. The opinion of the court below is consistent with this Court's decisions, and is simply an application of generally applicable Alabama contract law. The Alabama

Supreme Court's decision is also consistent with this Court's oft-stated premise that arbitration is to be a forum where parties may effectively vindicate their statutory rights. Petitioner has not identified a single case where a court enforced a purported waiver of punitive damages under the auspices of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, where the generally applicable substantive law of the state or federal statute at issue prohibited such a waiver. The Court therefore should not take up the question presented in the Petition for Certiorari.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MASTROBUONO*.

A. *Mastrobuono Is* Readily Distinguishable From This Case.

Cavalier claims that the Court's decision below conflicts with this Court's decision in *Mastrobuono*, pointing to language in that case where this Court spoke of enforcing arbitration clauses as written. In fact, the decision below in no way conflicts with *Mastrobuono*.

To begin with, Cavalier reads far too much into the brief snippet of language that it extracts from *Mastrobuono*. In fact, this Court has recognized two major exceptions to the doctrine that arbitration clauses are to be enforced as written. First, this Court has recognized that courts may decline to enforce arbitration clauses where they conflict with generally applicable state contract law. Second, this Court has recognized that arbitration clauses may not be enforced if they do not permit parties to effectively vindicate their statutory rights. When these two exceptions are recognized, it becomes clear that the decision below does not conflict with this Court's decision in *Mastrobuono*.

Mastrobuono did not involve a challenge to a contract provision prohibiting arbitration clauses, but instead involved a

challenge to an arbitrator's award of punitive damages to a party. Accordingly, the case did not involve a generally applicable body of state law, such as that applied by the court below here. In addition, the arbitration clause in *Mastrobuono* did not strip any party of his or her ability to effectively vindicate any substantive statutory right under state law, as did the arbitration clause in this case.

The phrase in *Mastrobuono* seized upon by Petitioner that punitive damages "are a matter of contract" is thus bereft of the context relevant here. As a general matter, parties may contract away any of their rights, unless there is some affirmative body of substantive law that prohibits such a waiver. It was against this general backdrop, and not in the face of any particular positive state law to the contrary, that this Court suggested in *Mastrobuono* that parties are free to contract as they wish with respect to the right to recover punitive damages.

B. This Court Has Consistently Held That The FAA Does Not Alter Or Override Generally Applicable State Laws.

The Alabama Supreme Court's holding -- that a court may not enforce a contractual provision prohibiting the award of punitive damages under Alabama statutes[2] -- is a routine application of the Federal Arbitration Act's express provisions and this Court's interpretations of the Act. Section 2 of the FAA states that contractual arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The Alabama Supreme Court's decision below is consistent with the command of the FAA and this Court's opinions interpreting the Act to subject contractual arbitration provisions to the same rules of state law that apply to other contracts. In *Doctor's Associates,*

---

[2] Punitive damages in Alabama are a creature of statute. *See* Alabama Code § 6-11-20.

Inc. v. Casarotto, 517 U.S. 681 (1996), this Court explained that Section 2 of the FAA places arbitration agreements on the same footing with other contracts so that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 687. Likewise, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court noted Section 2's savings provision and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provides grounds for the revocation of any contract.'" *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). The Court below did just this, applying generally applicable state law.

Alabama law forbidding parties from waiving liability for punitive damages is a generally applicable body of law that applies to all contracts, whether they involve arbitration or not. As the Alabama Supreme Court specifically stated in a case decided just a few weeks after the second opinion in this case:

> [I]t violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or judicial forum. Thus enforcement of this portion of the arbitration agreement violates public policy and its enforcement would be unconscionable.

Ex Parte Thicklin, 2002 WL 27925 (Ala. 2002). This is consistent with longstanding Alabama case law. *See, e.g., Reece v. Finch*, 562 So.2d 195, 199 (Ala. 1990) ("exculpatory agreements are not valid as to extreme forms of negligence or any conduct that constitutes an intentional tort.")

The Alabama Supreme Court's decision in this case is thus not directed against arbitration, but against a limitation on liability

that is not unique to or even related to arbitration. This conclusion is reinforced by the fact that the Court below compelled arbitration in this case. Cavalier suggests that the state court here was not applying generally applicable law, but was instead acting out of hostility to arbitration. But that is not so. The Court below has required the Jacksons to pursue their claims in arbitration, and the arbitral forum is no longer at issue in this case. This Petition, therefore, does not truly focus on arbitration, but instead on Alabama state contract law for exculpatory contracts.

C. This Court Has Consistently Stated That Arbitration Agreements May Involve A Change In Forum But Not A Waiver Of Or Failure to Effectively Vindicate Substantive Laws.

This Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum" – one with somewhat different and simplified rules – but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This Court has explained that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/ Johnson Lane Corp*, 500 U.S. 20, 26 (1991).

Numerous lower courts have interpreted this Court's direction in the same manner as the Court below, and directly contrary to the approach urged by Cavalier. In case after case, courts around the nation have applied this Court's jurisprudence to hold that arbitration provisions which limit a party's access to substantive statutory legal remedies that are available in court may not be

enforced.[3] Under Cavalier's theory, all of these cases contradict this Court's holding in *Mastrobuono* and were wrongly decided because they did not enforce the arbitration clauses at issue "as written." The truth is that these cases – just like the Alabama Supreme Court's decision below here – merely followed this Court's guidance that

---

[3] *See, e.g., Perez v. Globe Airport Security Services*, 253 F.3d 1280, 1286-87 (11th Cir. 2001) (arbitration clause that prevents prevailing Title VII plaintiff from recovering attorney's fees unenforceable); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) ("[E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose...."); *Cole v. Burns Int'l Security Serv's*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (arbitration must offer "all the types of relief that would otherwise be available in court"); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of court) ("When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable."); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (invalidating an arbitration agreement that required a claimant to forfeit rights and benefits guaranteed by the Petroleum Marketing Practices Act, including imposing a limit on the recovery of punitive damages and attorneys' fees and a one-year statute of limitations); *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to plaintiff before it occurred); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("arbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes"); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) ("contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 185 (D. Mass. 1997) (allowing plaintiff to pursue judicial claim under the Americans with Disabilities Act where arbitration agreement did not authorize arbitrator to provide remedy of 'reasonable accommodation' which plaintiff was entitled to pursue under the Act).

arbitration is to be favored and allowed only where it is just another forum for adjudicating a party's statutory rights, not a means of denying those rights.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THE OTHER CASES CITED BY CAVALIER.

Having failed to demonstrate any conflict between this Court's decisions and the decision of the Alabama Supreme Court below, Petitioner identifies no other decision that would create a split of authority on the question presented.

In nearly every case cited by Petitioner, the courts were considering challenges to arbitrators' decisions awarding punitive damages to a party – factual circumstances that were entirely unlike those involved here. This is true of *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994); *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387 (11th Cir. 1988); and *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984). Thus, none of these cases involved a challenge to an arbitration clause that prohibited punitive damages, and did not involve a body of state law prohibiting exculpatory clauses relating to punitive damages.

These cases are distinguishable on numerous other grounds as well. For one thing, several of them purport to be applications of federal common law, rather than state law. *See, e.g., Raytheon*, 882 F.2d at 11 n.5; *Baravati*, 28 F.3d at 707. As this Court has subsequently directed, however, generally applicable state law (like the Alabama law at issue here) should govern the issue. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.")

In fact, several of the decisions cited by Cavalier actually support the reasoning of the Court below here. For example, the principal point of the *Raytheon* case – that arbitrators should be permitted to award punitive damages – is entirely consistent with the Alabama Supreme Court's decision here:

> [P]unitive damages can serve as an effective deterrent to malicious or fraudulent conduct. Where such conduct could give rise to punitive damages if proved to a court there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.

Raytheon, 882 F.2d at 12.

In addition to relying upon cases that involve entirely different issues from those raised by this case, Cavalier bases its claims of a conflict in authority on stray passages of dicta from those cases. The quote relied upon by Cavalier from the *Baravati* case, 28 F.3d at 709, for example, is part of a somewhat free-wheeling discussion of the case law flowing from this Court's decision in *Mastrobuono*. The Seventh Circuit explicitly stated that this discussion – including the brief comment relied upon by Cavalier – was merely dicta:

> This disagreement *does not bear directly on the present case, however,* where there is neither a choice of law provision nor a provision in the governing arbitration rules concerning the scope of the arbitrator's remedial powers.

Id. at 709 (emphasis added). This Court need not resolve a conflict between a ruling about Alabama's contract law and a stray statement that "does not bear directly" upon a dispute about federal common law.

In *Davis*, similarly the language relied upon by Cavalier is prefaced by a word that plainly conveys that the quoted phrase is not a holding of the court: "*Presumably*. . .parties wishing to avoid the imposition of punitive damages in arbitration may simply expressly exclude punitive damages in the arbitration agreement." 59 F.3d at 1193. This passage captures the whole distinction between this case and those cited by Cavalier: courts presume that parties can contract to anything, in the absence of substantive state law to the contrary. There is no inconsistency between starting with such a presumption, however, and finding that it gives way to an affirmative body of state substantive law (such as Alabama's) providing that a given state statutory right may not be waived in an exculpatory clause.

Even the few cases cited by Cavalier that do not arise in the setting of the affirmance of an arbitrator's award are readily distinguished from this matter. *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446 (4th Cir. 1997), for example, also does not involve a challenge to an arbitration clause that bars punitive damages, or a substantive state body of law relating to such an exculpatory clause. Instead, the case posed the entirely unrelated question of whether a judge or an arbitrator should consider whether a party is barred from pursuing arbitration by laches if the party excessively delays initiating arbitration after a court orders it to do so. The phrase seized upon by Cavalier appears in a footnote in the portion of the opinion laying out the factual background, and plainly does not constitute a holding of the court. The brief quote is also merely a characterization and summary of *Mastrobuono* which has been shown above not to apply here.

Primeco Personal Communications v. Commonwealth Distributors, Inc., 740 So.2d 585 (Fl. Dist. Ct. App. 1999), similarly, does not involve a challenge to a ban on punitive damages based on state substantive statutory law. The entire portion of the opinion relating to punitive damages amounts to two sentences. A state intermediate appellate decision that fails to discuss the issue raised by the opinion below is not nearly sufficient to justify the exercise of this Court's jurisdiction.

Cavalier's claim that the cases listed above conflict with the opinion below in this case is also belied by other decisions from each of those jurisdictions. Not one of these jurisdictions takes the position that all arbitration clauses are to be enforced as written no matter what. Instead, each jurisdiction recognizes that arbitration clauses may not prevent parties from effectively vindicating substantive statutory rights, and each recognizes that arbitration clauses are not enforceable where they conflict with generally applicable state law.

The *Raytheon* case was decided by the First Circuit, for example, which has also recognized that generally applicable state laws may lead to the invalidation of particular arbitration contracts. *See Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989). The *Glass* case was decided by the Fourth Circuit, which has also recognized that courts should examine whether arbitration contracts run afoul of "such grounds as exist at law or in equity for the revocation of any contract." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). The *Bavarati* case was decided by the Seventh Circuit, which has also struck down arbitration clauses that run afoul of "ordinary state law contract principles." *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001). The *Davis* case was decided by the Eleventh Circuit, which has struck down an arbitration clause that had "provisions that defeat the remedial purposes of the statute. . .." *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998). The *Primeco* case was decided by a Florida District Court of Appeal, and another such court has struck down an arbitration clause that "effectively insulated" a company from "liability under state consumer laws. . . ." *Powertel v. Bexley*, 743 So.2d 570, 577 (Fla. Dist. Ct. App. 1999). Taken in context, then, there is no conflict between the opinion below and the complete body of law on this subject in any of the jurisdictions relied upon by Petitioner. Each of those courts has recognized the principles relied upon by the court below – that arbitration clauses do not permit parties to eliminate other parties' substantive rights to statutory remedies, and courts may refuse to enforce clauses that do

eliminate such rights under generally applicable rules of state contract law.

In short, Petitioner has identified no authority that conflicts with the Alabama Supreme Court's decision or supports the extraordinary contention that preemption under the FAA bars Alabama's generally applicable rule that the statutory right to pursue punitive damages for certain claims cannot be waived by contract.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., NW,
Suite 800
Washington, D.C. 20036
(202) 797-8600

G. William Gill
James G. Bodin
McPhillips, Shinbaum & Gill, L.L.P.
516 South Perry Street
Montgomery, Alabama 36104
(334) 282-1911

Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
One Kaiser Plaza, Suite 275
Oakland, CA 94612-3684
(510) 622-8150

Counsel for Respondent

Date: March 8, 2002